SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 14 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 487

THE AMERICANA CORPORATION, a corporation,

Petitioner,

vs.

EDWARD A. HABER, ROBERT H. MOEN, RONALD P. TAMILLO, JOHN WINNING, and ROBERT SISSON,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Americana Corporation, a corporation, defendant and counterclaimant in the District Court, prays that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, rendered on May 15, 1967, reversing a judgment of the United States District Court for the Central District of California, holding that certain designated employees were exempt from the provisions of the Fair Labor Standards Act under 29 U.S.C. Section 213(a)(1).

The Opinion of the Court Below.

No written opinion was filed by the District Court in connection with any phase of the litigation. The opinion of the Court of Appeals is not yet reported. A copy of the Opinion of the Court of Appeals is appended to this Petition for Writ of Certiorari as Appendix "A".

Jurisdiction.

Jurisdiction for review of this case upon a Writ of Certiorari is conferred upon this Court under 28 U.S.C. 1254, Sub. 1.

The Opinion of the Court of Appeals for the Ninth Circuit was filed May 15, 1967.

Questions Presented.

The question presented broadly involves a new and novel interpretation of the exclusion from the time and one-half provisions of the Fair Labor Standards Act of ". . . any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined . . . (by regulations of the Secretary,) . . .) . . ." [29 U.S.C. 213(a)(1)], and a new and novel interpretation and application of the regulation by which the Secretary has so defined the term "administrative capacity" [29 C.F.R. 541.2].

Respondents were employed as Area Supervisors in petitioner's credit and collection department. The exhaustive proofs concerning the duties of respondents are set forth in the Statement of the Case. Among other things, each respondent was compensated for his services on a salary basis during the period in question "at a rate of not less than $125.00 per week (exclusive

of board, lodging or other facilities),"* and each respondent was eligible to qualify under the proviso of 29 C.F.R. Sec. 541.2 *as it existed during the periods of employment in question*; the regulation was amended prior to trial raising $125.00 to $150.00 and in other respects. The Circuit Court of Appeals reversed the District Court's finding that respondents were employed in a bona fide administrative capacity, on the sole ground that respondents did not meet one of the five criteria (which in the aggregate comprise an alternate test to the proviso), specifically 29 C.F.R. 541.2 (d), because, according to the testimony of each respondent, he spent more than 20% of his time in "non-administrative" functions. There are conceptually only two ways this result could only have been achieved:

1. By requiring respondents to qualify under the proviso contained in 29 C.F.R. 541.2 as it existed AT THE TIME OF TRIAL and not as it existed DURING THE PERIODS OF EMPLOYMENT in question; or

2. By adding to the requirements set forth in the proviso (to be met as an alternative to meeting the requirements set forth in 29 C.F.R. 541.2, subsections (a) through (e)), the requirement set forth in 29 C.F.R. 541.2(d).

Accordingly, the first two questions presented are:

FIRST: Is the status of an employee as an administrative employee to be determined according to the definition set forth by the Secretary pursuant to express authority from Congress which is in force during the

*But not, in general, "at a rate of not less than $150 per week, etc" (excluding bonuses).

period of employment in question, or according to a redefinition in force at the time of trial, the effective date of which was subsequent to the termination of employment of the administrative employee, or, stated differently, are administrative regulations testing conduct to be applied retroactively?

SECOND: May the proviso contained in 29 C.F.R. 541.2 be judicially amended to read as follows by the addition of the italicized language:

> "Provided, that an employee who is compensated on a salary or fee basis at a rate not less than $125.00 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section, *except the requirements of subsection (d) of this section.*"

The District Court determined as a conclusion of law respondents were employed in a bona fide administrative capacity within the meaning of 29 U.S.C. 213 (a)(1). The District Court further made findings of fact with respect to each requirement set forth in 29 C.F.R. 541.2, Subsections (a), (b), (c), (d) and (e). Without regard to whether the respondents were entitled to qualify under the plain terms of the proviso, three further important questions are presented, in connection with the reviewing court's interpretation and application of 29 C.F.R. 541.2 (d) which provides the

employee may not devote more than 20% of his hours worked in the work week to activities which are not "directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; . . ." The Circuit Court of Appeals applied a test of whether "more than 20% of the employee's time be spent in nonadministrative work." Accordingly, the next question presented is:

THIRD: In computing the percentage of non-exempt hours under 29 C.F.R. 541.2 (d) worked by an employee, is the correct test one of time spent in "non-administrative work" or hours which are not "directly and closely related" to the employee's administrative work?

In the 2000 page Reporter's Transcript of the proceedings in the District Court, the evidence on the question of the duties and responsibilities of respondents was conflicting, consisting on the one hand of petitioner's evidence as to the duties of respondents, and, on the other, of respondents description of their respective duties, including evaluation and characterization of duties. The Circuit Court of Appeals reversed the District Court on the sole ground as aforesaid because:

> "Appellant Haber testified that about 60% of his time was spent in the non-administrative function of collecting accounts [Rep. Tr. p. 51], Ronald Tamillo estimated about 80% of his time was spent on telephone collections or dealing with merchandise. [Rep. Tr. p. 589], Winning estimated that 50% of his time was spent as a telephone collector, [Rep. Tr. p. 159]."

Accordingly the following questions are presented:

FOURTH: May a Circuit Court of Appeals reject findings of a District Court and choose conflicting testimony as controlling?

FIFTH: Is a person claiming benefits under the Fair Labor Standards Act the proper person to determine the nature or characterization of his duties, or does this invade the province of the trier of fact?

Constitutional Provisions, Statutes and Regulations Involved.

The Constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution.

The Federal statute involved is the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended (29 U.S.C. 201 *et seq.*), and particularly section 13 thereof, 29 U.S.C. 213(a)(1).

The Federal regulations involved are 29 C.F.R. Sec. 541.2 as it existed from revision, January 1, 1961 to revision January 1, 1964 printed as Appendix "B", and 29 C.F.R. Sec. 541.2, as it existed effective January 1, 1964, printed as Appendix "C".

Statement of the Case.

By an action filed in the United States District Court, respondents, Edward A. Haber, Ronald P. Tamillo, and John Winning sought enforcement of claims for overtime compensation pursuant to 29 U.S.C. 207, 216, for the following periods of employment:

	From	To	Amount
Edward A. Haber	8-14-62	5-15-63	$4,189.15
Ronald P. Tamillo	8-14-62	11-11-63	$8,459.16
John Winning	8-14-62	5-15-63	$4,433.00

[Clk. Tr. pp. 210, 211, 212].

Three other cases were filed against Americana seeking recovery for overtime compensation. Americana answered and filed a counterclaim seeking recovery for thefts from the company. The four cases were consolidated for trial. From judgments for Americana on the complaints and cross-complaints the various plaintiffs appealed.

The United States Circuit Court reversed and remanded certain portions of the cases for retrial. It is from the holding of the United States Circuit Court that the employees Edward A. Haber, Ronald P. Tamillo and John Winning were not exempt employees within the meaning of 29 U.S.C. Sections 206, 207, that this Petition is directed. Petitioner does not seek review of the decision of the Circuit Court on the *Sisson v. Americana, Seidenberg v. Americana,* or *Kalmus v. Americana* portions of the decisions. Nor does it seek review of the holding applicable to Robert Moen in the case of *Haber, et al. v. Americana.*

Petitioner Americana Corporation employed respondents in its Beverly Hills Office, in the credit and collection department [Clk. Tr. pp. 5, 6, 7, 10, 14, 15, 16; Rep. Tr. pp. 32, 36, 140, 228, 582, 775, 790, 911, 956], as "Area Supervisors". Appellant is the publisher of the Encyclopedia Americana and related works, and maintains two separate office staffs, one for sales and the other for credit and collections. The credit and collection section is made up of a Collection Manager, Assistant Collection Manager, Area Supervisors, telephone collectors, and billing and correspondence girls [Rep. Tr. pp. 263, 264].

The duties of the telephone collectors were to telephone accounts and collect money [Rep. Tr. pp. 810,

924, 959]. They could not discharge or "write off" an account [Rep. Tr. p. 935], forgive a debt or terminate a contract [Rep. Tr. p. 810], verify or check credit on new accounts or orders [Rep. Tr. pp. 925, 990], or instruct any other employees. No other employees worked under them [Rep. Tr. p. 961], and they never assigned work to other employees [Rep. Tr. pp. 810, 961]. They were instructed to sign in and out when arriving and leaving work [Rep. Tr. pp. 924, 976, 1013, 1112]. Work was assigned to them by their "Area Supervisors" [Rep. Tr. pp. 810, 960, 986, 988, 991, 999, 1080, 1093]. While their supervisors discussed accounts with them [Rep. Tr. p. 1008], they never made any independent decision on any account [Rep. Tr. p. 1011]. Collectors working outside of the office reported into their Area Supervisor concerning problems in their area and were advised as to how to handle them [Rep. Tr. p. 82]. The salary of the telephone men ranged from $400.00 per month [Rep. Tr. pp. 822, 912, 1129], to the maximum of $500.00 [Rep. Tr. pp. 822, 959]. They were given $50.00 incentive bonuses on occasion [Rep. Tr. pp. 847, 912], which bonuses were dependent upon the collection activities of the area.

In the office structure, the Area Supervisors, five in number [Rep. Tr. p. 263] had certain geographical areas assigned to them. Working under the Area Supervisors were the telephone collectors and the various billing and correspondence girls [Rep. Tr. p. 266]. The duties of the Area Supervisors were to enforce and put into practice, the policies and procedures handed down by the company [Rep. Tr. p. 264], and it was up to them how to carry it out [Rep. Tr. pp. 102,

117, 264]. They were expected to use a "great deal of discretion and exercise a lot of judgment" in their work [Rep. Tr. pp. 117, 264]. They conferred with both Mr. T. C. May, President of the Company, the Resident Manager, and the Collection Manager in the enforcement and practice of the company procedures and policies. The Supervisors could forgive a debt owing to the company [Rep. Tr. pp. 265, 1078], accept partial payments [Rep. Tr. pp. 158, 183] and extend contracts. They directed the activities of the telephone men [Rep. Tr. p. 266], allocated and directed the girls in their area in correspondence and billing work [Rep. Tr. pp. 82, 204, 205, 266]. The supervisors guided the girls in their duties, assigned work, criticized or praised work and saw that the work was properly done [Rep. Tr. p. 267]. In addition, the Area Supervisors had the responsibility of assignment of accounts to the telephone men [Rep. Tr. pp. 76, 80, 193, 269, 1074] apportionment of work among the telephone men [Rep. Tr. pp. 82, 163, 269, 1075] interviewed and employed new people for the company [Rep. Tr. pp. 162, 190, 194, 272] recommended discharge or transfer of employees [Rep. Tr. p. 78] which recommendations were followed to a great extent [Rep. Tr. p. 272]. As part of the performance of the duties as Area Supervisors, they reported to the Collection Manager on activities in their areas [Rep. Tr. p. 89]. Recommendations were made by them as to how to handle the collection problems which arose [Rep. Tr. pp. 116, 202]. In the exercise of their discretion, they could decide on the approach to the collection of accounts and the verification of contracts [Rep. Tr. p. 117], in that they could accept partial payments on accounts

[Rep. Tr. pp. 158, 183], and extend time for payment of accounts [Rep. Tr. p. 183]. In determining whether credit should be extended, they considered the occupation, length of employment, dependents, and other credit references in selecting an alternative to follow [Rep. Tr. p. 186]. Their decisions on these matters were final [Rep. Tr. p. 187]. The recommendations made to the company by the Area Supervisors concerning credit acceptable or rejection were followed [Rep. Tr. pp. 52, 54, 82, 160]. The Area Supervisors collected information for the Collection Report to be given to the company, and turned the information over to an employee who compiled the reports [Rep. Tr. p. 701]. The Area Supervisors had direct and continuous responsibility over some $15,000,000.00 in accounts receivable directly related to the general business operations of the company. They were constantly available and their responsibilities and discretion were of a full time continuous nature. They were not required to sign in and out on time sheets as were the telephone men and the billing and accounting girls. The duties of all Area Supervisors were substantially the same [Rep. Tr. p. 1100].

They were paid $500.00 to $700.00 per month and were given a Christmas bonus of $1,500.00 [Rep. Tr. p. 275]. During the period in question, each respondent had a base and guaranteed salary of or in excess of $600.00 per month, paid semi-monthly on the first and fifteenth [Clk. Tr. pp. 144, 145, 165, 205, 206 and 208].

Edward Haber, who was designated an Area Supervisor, attended general meetings [Rep. Tr. p. 61], interviewed employees [Rep. Tr. p. 74], make recommendations as to employment and discussed rates of

pay [Rep. Tr. p. 75]. He allocated accounts to collectors in his area [Rep. Tr. pp. 76, 80] reviewed their work [Rep. Tr. p. 77], reported to management on their work, discussed pay increases with telephone collectors [Rep. Tr. p. 77] recommended transfers and termination of employees which were followed [Rep. Tr. p. 78], took reports of outside collections in his area and coordinated outside work with inside work in his area [Rep. Tr. p. 96]. He could use his own discretion and judgment in carrying out the orders and duties given to him by the Collection Manager [Rep. Tr. p. 102]. There were seven employees in his area. He attended meetings where collection policies and approach were discussed, made recommendations which were generally followed [Rep. Tr. pp. 116, 117, 120]. He personally cancelled amounts of monies owing to the company [Rep. Tr. p. 1110] without merchandise the merchandise being returned to the company. He received general instructions from the Collection Manager, and was left to his own discretion and judgment as to how to carry out company policy.

John Winning, another designated Area Supervisor, was instructed by the Collection Manager on his duties [Rep. Tr. p. 148] which were substantially the same as other supervisors [Rep. Tr. p. 1100]. He could accept partial payments on accounts [Rep. Tr. p. 158], did some credit checking and passed on orders [Rep. Tr. p. 160], directed the telephone collectors in their work, and the girls working in his area [Rep. Tr. pp. 193, 1080], could cancel accounts [Rep. Tr. pp. 1078, 1079]. He interviewed new employees and discussed salaries, raises and profit sharing plans with them [Rep. Tr. pp. 191, 1072, 1073]. After new employees

were hired, he explained their duties and allocated their work [Rep. Tr. p. 1074]. Mr. Winning checked the work of the telephone collectors [Rep. Tr. p. 1075], and solved any problems taken to him by the collectors [Rep. Tr. p. 1075]. In checking on new contracts, Mr. Winning would consider the occupation, length of employment, residence, age and dependents of the prospective purchaser, and accepted or rejected the credit [Rep. Tr. pp. 174, 175, 179]. In the collection of accounts in his area, and in working with the telephone collectors, Mr. Winning could extend the time for payment, determine the truthfulness of the statements, inquire into debts, accept partial payments, and select whichever alternative to follow in the collection of the account [Rep. Tr. pp. 183, 186, 193]. His decisions on these matters were final [Rep. Tr. p. 187]. The out of town collectors who worked his area reported directly to him [Rep. Tr. p. 188]. His area handled from 15,000 to 17,000 accounts [Rep. Tr. p. 193].

During his employment as Area Supervisor, he conferred with the Collection Manager about hiring [Rep. Tr. p. 194], made suggestions to management as to how the work could be facilitated [Rep. Tr. p. 202], and worked closely with the Collection Manager [Rep. Tr. p. 206]. He earned $9,550.00 in the year 1962, and from January to May of 1963, $3,400.00. He was given a $1,500.00 Christmas bonus during his employment.

Ronald Tamillo first worked for petitioner in 1957 as a telephone collector [Rep. Tr. p. 582]. In August of 1962, he was designated an Area Supervisor, at the rate of $600.00 per month. Since he had a good background in collections and investigations [Rep. Tr. p.

581], he handled "intricate problems which took considerable experience" [Rep. Tr. pp. 626, 627]. He was asked to go to Mexico by the President of the Company, T. C. May, to reduce the delinquencies, and to look for "holes to plug up" in the collection efforts [Rep. Tr. p. 628]. During the time in Mexico, he negotiated contracts between union officials, the Mexican Government and Americana for the purchase and sale of books in the oil refineries [Rep. Tr. pp. 633, 696] and helped with the preparation of agreements for the Mexican business [Rep. Tr. p. 633]. He reported directly to Mr. May. In August of 1962, he returned to Los Angeles, and in September of 1962, he was sent to Hawaii to straighten out that office [Rep. Tr. p. 634]. He reviewed the delinquent accounts before leaving for Hawaii [Rep. Tr. p. 637], handled the Better Business Bureau complaints while there [Rep. Tr. p. 637], interviewed people for employment in Hawaii, rated applicants, recommended salaries, and evaluated the Hawaiian accounts, working with the Hawaiian collectors [Rep. Tr. p. 649]. He reported to T. C. May, the President of Americana, and to Carolyn Allison, the President Manager [Rep. Tr. pp. 646, 655, 657]. He returned to Los Angeles, and then was sent to Hawaii in May of 1963 [Rep. Tr. p. 654], doing the same work and activities [Rep. Tr. p. 656]. While he was in Hawaii, the Resident Manager asked to have him sent to Chicago to report and solve the delinquency problems in that office [Rep. Tr. pp. 658, 661]. He was brought to Chicago for this purpose and reported to Mrs. Allison, after reviewing the collection reports, to determine where the delinquency was arising [Rep. Tr. p. 672]. From Chicago, Mr. Tamillo

was sent to Washington D.C. office, and from there to Puerto Rico to look over the delinquency problem and to solve it [Rep. Tr. p. 687]. While in Washington, D.C. office, he discussed the collection problems in the United States with the Chairman of the Board, the Resident Vice-President of the Washington, D.C. office, and was instructed in his efforts to "stem the tide" of delinquency by the Resident Vice President, Vincent Sutliff, Jr. [Rep. Tr. p. 596] and Mrs. Allison, the Executive Vice President of petitioner [Rep. Tr. p. 595]. Another man had been sent from Canada to help on the problems [Rep. Tr. p. 598]. The instructions were given that there was an extreme delinquency problem and to "get it down" [Rep. Tr. p. 597], both in Washington, D.C., and Puerto Rico. Upon his return from Puerto Rico, he was sent on a collection trip by the Washington, D.C. office to again determine the cause of delinquent accounts and correct them. He reported directly to the Executive Vice-President, the Resident Vice-President of the Washington, D.C., office and the Chairman of the Board.

Prior to his specialized trips on collections, Mr. Tamillo was employed as an Area Supervisor in the Beverly Hills, California, office, directing telephone collectors on their accounts [Rep. Tr. pp. 985, 986] assigned accounts to telephone collectors [Rep. Tr. p. 991]. He supervised three or four collectors, by giving them their work, telling them what to do, who to call and what to handle [Rep. Tr. p. 1051]. He cancelled accounts owed to the company [Rep. Tr. pp. 1034, 1057], handled Better Business Bureau complaints, dictated letters to his secretary [Rep. Tr. p. 1030], told her what work to do, supervised her work [Rep. Tr.

pp. 1031, 1042, 1049]. Mr. Tamillo handled all of the calls directed to the Collection Supervisor [Rep. Tr. p. 1052]. He was compensated at the rate of $600.00 per month plus expenses in 1962, $650.00 per month in 1963, plus expenses, and raised to $750.00 per month in November, 1963, plus his expenses. Expenses during his travels averaged $250.00 per month.

REASONS FOR GRANTING CERTIORARI.

A. First and Second Questions.

Is the status of an employee as an administrative employee to be determined according to the definition set forth by the Secretary pursuant to express authority from Congress which is in force during the period of employment in question, or according to a redefinition in force at the time of trial, the effective date of which was subsequent to the termination of employment of the administrative employee, or, stated differently, are administrative regulations testing conduct to be applied retroactively?

May the proviso contained in 29 C.F.R. 541.2 be judicially amended to read as set forth in Questions Presented, SECOND, of this Petition for Writ of Certiorari, by the addition of the language there underscored?

Although the district court did not expressly find that respondents qualified as administrative employees under the requirements of the *proviso* contained in 29 C.F.R. 541.2, as well as under the alternative five-part test set forth therein, the district court must be upheld

even if in reaching a correct conclusion it gives the wrong reason.

Levinson v. Spector Motor Serv. (1935), 59 N.E. 2d 817, 389 Ill. 466, aff'd 330 U.S. 649.

Respondents did qualify under the proviso as it existed during the periods of employment in question (See Appendix B). Effective January 1, 1964, the proviso was amended raising the $125.00 requirement to $150.00 and in other respects (See Appendix C).

The Circuit Court of Appeals reversed the district court's finding that respondents were employed in a bona fide administrative capacity on the sole ground that respondents did not meet one of the five criteria which in the aggregate comprise an alternative test to the proviso; specifically, that respondents did not meet the requirements of 29 C.F.R. 541.2(d).

This result can only be reached either by applying retroactively the provisions of the provisions of the proviso as it existed from January 1, 1964 and at the time of trial, or by appending to the requirements which must be met to qualify under the proviso, the requirements of 29 C.F.R. 541.2(d), in either of which events the application of the regulations is new, novel, and conflicts in substance with the application of the regulations by other districts and by this court, as set forth below. Throughout this country business engaged in interstate commerce look to and rely on the regulations promulgated by the Secretary of Labor in the efficient conduct of their affairs. The regulations are meticulous and admit only of interpretation by the court, not of outright change of retroactive application.

1. First Question.

The regulation at the time of the trial may be applicable in an action by the Secretary of Labor to enjoin a violation of the provisions of the Fair Labor Standards Act.

Wirtz v. Mississippi Publishers Corp., 364 F. 2d 603 (1966) [By necessary implication]

but in all actions the appropriate regulation governing conduct in failing to pay overtime for a *certain period* must be the regulation in effect *during that period.*

Wirtz v. First State Abstract Ins. Co., 362 F. 2d 83 (1966) [By necessary implication].

The regulations promulgated by the Secretary of Labor pursuant to express sanction of Congress have the force of law.

Helwell v. Haberman, 140 F. 2d 833 (1944).

A statute is generally enacted to take effect from a time anterior to its passage; even assuming Congress intended the regulations to be applied retroactively, if a statute has a retroactive or retrospective effect which imposes upon a party the burden of proving a fact at the time of trial as a necessary element of his cause of action or defense, not requisite under the law as it stood prior to the enactment of the statute and at the time his cause of action or defense arose, the enactment denies the party due process and is unconstitutional as retroactive.

United States ex rel. Feuer v. Day, C.C.A. N.Y., 42 F. 2d 127.

2. Second Question.

The Secretary intended his definition of an employee employed in a bona fide administrative capacity to be an alternative test, whereunder the employee may be so classified if he meets the criteria of subsections (a) through (e) of 29 C.F.R. 541.2, *or,* in the alternative the requirements of the proviso.

In Subpart B—Interpretations, Regulation 541.213 it is explained:

> "Such a highly paid employee is deemed to meet all of the requirements in Sec. 541.2(a) through (e). If an employee qualified for exemption under this proviso, it is not necessary to test his qualifications in detail under Sec. 541.2(a) through (e)." 29 C.F.R. 541.213 (Italics supplied).

B. Third Question.

In computing the percentage of non-exempt hours under 29 C.F.R. 541.2(d) worked by an employee, is the correct test one of time spent in "nonadministrative work" or hours which are not "directly and closely related to the employees' administrative work?

With regard to the reason the Circuit Court of Appeals reversed the district court's determination the employees met the criteria set forth in 29 C.F.R. 541.2, subsections (a) through (e), the Circuit Court of Appeals set forth a test of characterizing non-exempt hours as time spent in "nonadministrative work". The particular requirement, 29 C.F.R. 541.2(d) sets forth a test of classifying non-exempt hours as hours in the workweek devoted ". . . to activities which are not directly and closely related to the performance of the work

described in Paragraphs (a) through (c) of this section."

The interpretative regulations make it clear there are three, not two categories of work to be considered:

> "§ 541.202 Categories of work.
>
> (a) The work generally performed by employees who perform administrative tasks may be classified into the following general categories for purposes of the definition:[7] (1) The work specifically described in paragraphs (a), (b), and (c) of § 541.2; (2) routine work[8] which is directly and closely related to the performance of the work which is described in paragraphs (a), (b), and (c) of § 541.2; and (3) routine work which is not related or is only remotely related to the administrative duties." 29 C.F.R. 541.202.

The Circuit Court of Appeals assumed that Respondents' executive functions were their respective administrative functions, and that their respective administrative functions were non-administrative functions. In other words, the court assumed that "collecting" in the manner it was practiced by these employees was a non-exempt or nonadministrative function.

The Circuit Court of Appeals did not even consider or analyze the clear feeling of the district court that the business activity of collecting delinquent accounts *as it was practiced by these Respondents,* in outstanding contradistinction to "collecting" as it was practiced by their subordinates, the telephone collectors, was work performed in an administrative capacity, and that the broad executive functions of the Respondents were in addition thereto.

Although the terms "executive" and "administrative" are intended to establish two distinct categories of exempted employees, they are somewhat synonymous, and of necessity classifications established thereby do overlap.

Walling v. Armour & Co. (D.C. Kan., 1947), 13 Labor Cases ¶ 63,883.

During a workweek an employee who performs functions exempted under two classifications, is exempt as a combination administrative and [professional] employee, provided he does not perform more non-exempt work than allowable.

McComb v. Eimco Corp. (D.C. Utah, 1949), 16 Labor Cases ¶ 65,107, 83 F. Supp. 635.

An employee who fails to qualify for an executive exemption because he spends more than maximum time allowed at nonexempt work, may qualify for administrative exemption where such work qualifies for administrative exemption in that it is related to his administrative duties.

Sparks v. Pederson (D.C. Conn., 1949), 17 Labor Cases ¶ 65,327.

W & H Opinion Letter, April 7, 1941.

The peremptory application of a static and incorrect test by the Circuit Court of Appeals, and the failure to analyze the functions performed by Respondents in terms indicated by the Regulations to be appropriate, is a new approach to the complicated, and often subtle, analysis of facts found in reported decisions concerning this recurring question of capacity. The problem of classifying an employee is a serious one and industry

should be able to rely on the Regulations and Bulletins of the Secretary of Labor in assigning executive and administrative duties. Petitioner respectfully submits that the test applied by the Circuit Court of Appeals raises an important question concerning interpretation of the Fair Labor Standards Act which may in the future affect all industries engaged in interstate commerce.

C. Fourth and Fifth Questions.

May the Circuit Court of Appeals reject findings of a District Court and choose conflicting testimony as controlling?

Is a person claiming benefits under the Fair Labor Standards Act the proper person to determine the nature or characterization of his duties, or does this invade the province of the trier of fact?

The determination of the bona fide administrative capacity of an employee under the Fair Labor Standards Act is a question of fact.

McComb v. Utica Knitting Co. (CA 2 1947), 13 Labor Cases ¶ 64,137, 164 F. 2d 670.

In choosing the conflicting testimony of respondents to reverse the district court, the Circuit Court of Appeals has set itself in conflict with the decisions of this court and the decisions of other districts, holding that bona fide executive or administrative capacity is a question of fact, and with well established principles respecting the function of the trier of fact. For this additional reason, taken together with the questions analyzed above, Petitioner urges that the Circuit Court

of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervision.

In interpreting the regulation, a Circuit Court of Appeals may not reject the findings of a district court because of conflicting testimony. The district court who hears the witnesses is the proper judge of their credibility.

Walling v. General Industries Co., 330 U.S. 545.

In addition to the evidence before the Court, the judge was entitled to draw an inference of administrative status from the compensation of the respondents. In 1962, respondent Tamillo's total compensation (including bonuses) was $10,724.75, and respondents Haber and Winning's total compensation for said period was $9,550.00 each.

Jones v. Bethlehem Fairfield Shipyard (D.C. Md. 1947), 14 Labor Cases ¶ 64,258, 75 F. Supp. 86.

The trial court was entitled to disbelieve, for instance, that respondent Tamillo, who was paid twice the salary of a telephone collector, spent about "eighty percent of his time on telephone collections or dealing with merchandise [Rep. Tr. p. 589], particularly when the evidence adduced by petitioner was to the effect respondent Tamillo was, in fact, engaged in trouble-shooting all over the world. The trial court was entitled to disbelieve, for instance, the testimony of respondent Haber against whom judgment was affirmed for money damages arising out of activities to misappropriate petitioner's property. Examples of the conflicting evidence in the record are too numerous to multiply.

Conclusion.

The problem of classifying an employee as an administrative or executive employee is one which recurs in industry engaged in interstate commerce, and as indicated by the wealth of decisional law, the problem presents complicated and subtle facets. When administrative duties are conferred and a remuneration in excess of the amount set forth in the then effective regulation to qualify under the proviso of 29 C.F.R. 541.2 is paid, a remuneration so handsome as to almost preclude a claim that the employee is not employed in an administrative or executive capacity, then the employer ought not to still be at risk that a Circuit Court of Appeals will overturn the determination of the trier of fact by applying incorrect law and incorrect tests to the duties of Respondents as disclosed by the record. Petitioner respectfully submits that this case will have a serious impact on industry and involves a need for interpretation by this court of the provisions of the Fair Labor Standards Act and the regulations promulgated thereunder by authority of Congress.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

HENRY E. KAPPLER,
Attorney for Petitioner.

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Edward A. Haber, Robert H. Moen, Ronald P. Tamillo, John Winning and Robert D. Sisson, *Appellants*, vs. The Americana Corporation, a corporation, *Appellee*. Nos. 20,711 to 20,714.

[May 15, 1967]

Appeals from the *United States District Court for the Southern District of California, Central Division. Before: Barnes and Jertberg, Circuit Judges; and **Halbert, District Judge.

Barnes, Circuit Judge:

Separate actions were initiated by Edward A. Haber, Robert H. Moen, Ronald P. Tamillo and John Winning, appellants in No. 20711, Robert D. Sisson, appellant in Nos. 20711 and 20712; Alvin Seidenberg, appellant in No. 20713 and Robert Kalmus, appellant in No. 20714, to recover unpaid overtime compensation. The four cases were consolidated for trial in the District Court, and have been consolidated in this court for the purpose of this appeal.

Appellants are all former employees of appellee Americana Corporation. They brought suit against their former employer under the Fair Labor Standards

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*Now the United States District Court for the Central District of California.

**Sherrill Halbert, United States District Judge for the Eastern District of California, sitting by designation.

Act for unpaid overtime compensation, jurisdiction of the district court being under 28 U.S.C. § 1337. Americana counterclaimed for misappropriation and conversion of its property, jurisdiction of the counterclaim being under 28 U.S.C. § 1332(a)(1). We have jurisdiction of the appeal under 28 U.S.C. § 1291.

Americana Corporation's principal product is the Encyclopedia Americana which is sold in sets by salesmen throughout the country. In its Beverly Hills office Americana maintained a collection department to stimulate collections on accounts receivable. During 1963 and early 1964 appellants were employed in the collection department in various capacities. Some of appellants were telephone men, whose job was to call persons whose accounts were delinquent and urge payment. Other appellants were "area supervisors", whose functions, inter alia, included supervision of telephone men in their area. Americana operated on a standard 37½ hour work week, for which appellants were compensated at a flat monthly rate, regardless of hours worked. Appellants were also able to earn "bonuses" if they collected fifty-one per cent or more of the accounts assigned to them on a monthly basis.

Many of the employees in the collection department were engaged in one or more schemes to defraud the employer. One such scheme took the form of employees purchasing 1963 sets of the encyclopedia and paying for an out-of-date 1958 set. The 1963 set then would be sold by the employee to a third party at a profit. Another scheme involved collecting, through a dummy organization, long dormant accounts where the employees would retain the proceeds. A third scheme involved falsification of company records so that employees

would be paid bonuses which were not in fact earned. The losses from these nefarious enterprises are the basis for Americana's counterclaim.

The court below found that appellants had been adequately compensated for their overtime work. It also found that three appellants, Haber, Ronald Tamillo and Winning, as "area supervisors" were within the "administrative capacity" exemption for the overtime requirement of the Fair Labor Standards Act. Finally, the court found that five of the appellants had conspired against Americana and rendered a judgment against them and in favor of Americana in the amount of $77,400. These three findings are challenged here.

I. *Overtime Payments*

The district court, as noted, found that each of the appellants had been adequately compensated for overtime. The evidence supporting that finding is the testimony of Mr. Keleman, a certified public accountant. Mr. Keleman explained his approach thoroughly (R.T. pp. 1257-58), and further explained it on voir dire (R.T. pp. 1262-74). His method was to take the monthly salary and multiply by 12 to get the yearly wage. The yearly wage was divided by 52 to find the weekly pay, which was divided by 37½ to obtain the regular hourly rate. This is substantially the procedure required by 29 C.F.R. § 778.113(b). At point, however, is the treatment of the "bonus" payments.

Mr. Keleman in his calculations used only the monthly salary to find the regular rate of pay. He then treated the "bonus" payments as compensation for overtime to arrive at his conclusions as to the adequacy of the compensation of individual appellants.

In this he was in error. The Act requires the regular rate to include "all remuneration for employment". 29 U.S.C. § 207(d). Excluded therefrom are certain items, §§ 207(d)(1) and (3)(a) being relevant here. Section 207(d)(1) excludes gifts made on special occasions the amounts of which are not dependent upon hours worked, production or efficiency. The present situation is not within that provision since the employees had to achieve a certain level of efficiency to get a bonus, and such bonuses were paid regularly rather than on special occasions. Section 207(d)(3)(a) applies only if the fact that the payment is to be made and the amount are in the sole discretion of the employer. Here a fixed level of performance determined whether or not a bonus was paid, not the discretion of the employer. Not being excluded, the bonus payments should have been included in calculating the regular rate of appellants' compensation, and should not have been treated as overtime compensation.[1]

The accountant's conclusions as to adequate remuneration were erroneous because based on incorrect treatment of "bonuses", if for no other reason. As the court's findings were based on these conclusions, they too were erroneous, and must be reversed.

II. *Administrative Capacity*

Excluded from the time-and-one-half provisions of the Fair Labor Standards Act is "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined . . . by regulations of the Secretary, . . .) . . ." 29 U.S.C.

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[1]The bonus payments really amounted to commissions. As such we would reach the same result. 29 C.F.R. § 778.117.

§ 213(a)(1). The Secretary has provided, in 29 C.F.R. § 541.2, five criteria which must be met to qualify under the administrative exemption of 29 U.S.C. § 213-(a)(1). One of these (29 C.F.R. § 541.2(d)) is that no more than twenty per cent of the employee's time be spent in nonadministrative work. The test is not what employees are called, but what they actually did. There is no evidence brought to our attention of compliance with this requirement. Indeed, the only evidence is to the contrary. Appellant Haber testified that about sixty per cent of his time was spent in the nonadministrative function of collecting accounts. (R.T. p. 51.) Ronald Tamillo estimated about eighty per cent of his time was spent on telephone collections or dealing with merchandise. (R.T. p. 589.) Winning estimated that fifty per cent of his time was spent as a telephone collector. (R.T. p. 159.)

In sum, the only evidence as to compliance with 29 C.F.R. § 541.2(d) is that there was no compliance. The court's conclusion that Haber, Ronald Tamillo and Winning were employed in an "administrative capacity" is erroneous and must be reversed.

III. *The Employee Conspiracies*

There was ample evidence that some employees in the collection department were engaged in conspiracies to defraud Americana. We deal with the evidence as to each appellant on the counterclaim.

A. *Haber*

There is evidence to sustain a finding that Haber participated in the schemes to misappropriate Americana property. Alterations of records were on occasion done "under the direction of Mr. Haber." (R.T. p. 1597,

lines 2-3.) ". . . [H]e is the one who showed me how to do it." (R.T. p. 1597, line 8.)

> "Q. How many conversations did you have with Mr. Haber regarding the false entries on these ledger cards?
>
> "A. Toward the end of every month, I would say the last week of every month that I was there, this happened when I was working in Mr. Haber's section." (R.T. p. 1601, lines 3-7.)

There was no error in the court's finding that Haber had misappropriated funds from Americana.

B. *Moen*

Moen's participation in the alteration of records was likewise supported by the evidence.

> "Q. Did you ever see anyone else make any change of due dates or change of payment dates in the activity book?
>
> "A. Yes. It was Bob Moen, who was in John Winning's section; myself being in Ed Haber's section.
>
> "Q. Did you ever have any discussions with Mr. Moen about these changes?
>
> "A. Yes, many times.
>
> "Q. And what did he say and what would you say?
>
> "A. Well, we would discuss it. I was quite friendly with Mr. Moen. After work we would be with each other and would be just talking, I would say, 'How many payments are you short towards this month,' toward the bonuses, which is our 51 per cent?

Well, he said, 'Well, I have to finagle about 27 more payments,' or what have you, on the end of the month, or cancellations on the unidentifiable tickets." (R.T. p. 1599, line 17 to p. 1600, line 6.)

C. *Ronald Tamillo*

The evidence abounds as to Wayne Tamillo's defalcations. Such evidence is irrelevant, however, on the question of Ronald Tamillo's liability for Americana's losses. Appellee would have us make him liable on the basis of (1) being Wayne Tamillo's brother, (2) testifying favorably to certain appellants at the trial below, and (3) the taking and copying of company records, without authorization. The first two grounds are so lacking in substance as to not require discussion. The third is allegedly supported by appellee's reference in its brief to "Rep. Tr. pp. 669, 676, 678-684." We find no relevance in any of the three references. Page 669 refers to a "table of organization," offered in evidence, but received, marked as "Ex. Q., *for Identification only.*" Page 676 refers to Exhibit PP, also not in evidence, but marked "*for Identification only.*" Pages 678 and 684 refer to "Exhibit R, for Identification only"; and not in evidence; and "Exhibit S," which *was* received in evidence. It is a group of seven applications for employment, wherein it is shown that the applicants were interviewed and rated by Ronald Tamillo. No reference is made to any of these applications having been "unauthorizedly taken or copied," and we fail to see their relevancy or that they support appellee's statement.

The proffered proof does not amount to the "full, clear and satisfactory proof" required to establish con-

spiracy and fraud. See *Stevenson v. Stevenson,* 36 Cal. App.2d 494, 502 (1940).

We might speculate that the trial court was swayed by all the evidence against "Mr. Tamillo". Such evidence cannot sustain a judgment, however, unless it is related to Ronald Tamillo in particular. As to Ronald Tamillo the judgment on the counterclaim must be reversed.

D. *Winning*

As in the case of Ronald Tamillo, there is a complete absence of any evidence as to participation in any scheme by Winning.

After Winning and others had been discharged, the group visited a local tavern (LeRoy's) where a conversation as to Mr. Tamillo (presumably Wayne) took place.

> "Q. And did you have a conversation with them at LeRoy's?
>
> "A. There was—yes, we did. There was Mr. Winning, Mr. Haber, myself, Bob Moen, Joseph Temple. I guess that is the amount of people that were there, and Mr. Haber stated, 'I can hang that so-and-so, if I really wanted to.'
>
> And Mr. Winning stated, 'Well, do it,' because they did not like Mr. Tamillo.
>
> And Mr. Haber's exact words is 'If I hang him, I am hanging myself.' He says, 'I can't do it.'" (R.T. p. 1624, lines 4-13.)

This conversation might reflect Haber's participation, but it does not involve Winning. As to Winning it

reflects little more than anger at being terminated, which is far from enough to sustain the judgment against him.[2] The judgment against Winning must be reversed. *Causey v. United States, supra.*

E. *Sisson*

There is ample evidence that Sisson was another employee engaged in cheating Amrericana. For example:

> "Q. Did you ever receive any money from Mr. Sisson?
>
> "A. Just on padding the expense account. Other than that, that was it." (R.T., p. 1612, lines 21-23.)

He was also involved in the scheme of buying new books at the old book prices. (R.T. p. 1611, lines 11-23.) There was no error in including Sisson in the judgment on the counterclaim.

As to the amount assessed by the court below as damages, we are at a loss to discern any reasonable basis for the amount selected, $77,400. Appellee offers some speculations and guesses to suggest that the court's award was less than it might have been.[3] That is not enough.

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[2]The only other reference to Winning is the testimony that Moen, one of Winning's subordinates, falsified certain records. Needless to say, this, without more, is not evidence against Winning.

[3]Americana's estimate, based on Lenay's testimony, was the loss of 100 accounts per month. There was, by estimate, an average balance of $100 to $150 in each account. Thus Americana asserts that it was losing $10,000 per month. There is no evidence that Americana could reasonably expect to recover 100% of each of these delinquent accounts. But even the $10,000 per month figure is unrelated to the award of the court.

The judgment of the court below is set aside. The case is remanded with instructions to:

(1) Ascertain the amount of overtime worked by appellants and the compensation due thereon;

(2) Ascertain and fix the actual amount of damages suffered by Amricana arising from the misappropriations and defalcations of all alleged conspirators; and

(3) Dismiss the counterclaim as to cross-defendants Ronald Tamillo and Winning.

APPENDIX B.

EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

§ 541.200 Definition of "administrative".

Section 541.2 defines the term "bona fide * * * administrative" as follows:

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13 (a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in this subpart); or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $95 per week (or $70 per week if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $125 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

[14 F.R. 7730, Dec. 28, 1949, as amended at 24 F.R. 581, Jan. 27, 1959, 26 F.R. 8637, Sept. 15, 1961]

'This special proviso is applicable to all employees covered by the Act, including those in Puerto Rico and the Virgin Islands.

29 C.F.R. §541.2 Revised as at 1-1-61. Revised as at 1-1-63.

Revised.

APPENDIX C.

EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY.

§ 541.200 Definition of "Administrative".

Section 541.2 defines the term "bona fide * * * administrative" as follows: The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(c) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who (except as provided in § 541.5b of this part) is compensated for his services on a salary or fee basis at a rate of not less than $100 per week (or $75 per week if employed in Puerto Rico, the Virgin Islands or American Samoa) exclusive of board, lodging, or other facilities:

Provided, That an employee who (except as provided in § 541.5b of this part) is compensated on a salary or fee basis at a rate of not less than $150 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

'This special proviso is applicable to all employees covered by the act, including those in Puerto Rico, the Virgin Islands and American Samoa.

29 C.F.R. § 541.2. Revised as at 1-1-64.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 487

THE AMERICANA CORPORATION, a corporation,
Petitioner,

vs.

EDWARD A. HABER, ROBERT H. MOEN, RONALD P. TAMILLO, JOHN WINNING and ROBERT SISSON,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Introduction.

This case presents no special and important reason why it should be heard by this Court. Its significance is largely confined to the facts and is of importance only to the parties. The decision of the Court of Appeals below, coupled with the record, clearly reveals that no significant questions have been left unanswered and no departure from judicial standards has been made. Accordingly, a grant of certiorari would not be warranted.

Opinion Below.

The opinion of the Court of Appeals (Pet. App. 1, *et seq.*) is reported at 378 F. 2d 854.

Statutes and Regulations Involved.

Respondents concur in Petitioner's statement regarding the pertinence of the Fair Labor Standards Act and the regulations promulgated by the Department of Labor thereunder. Respondents dispute, however, the pertinency to this case of the Due Process Clause of the Fifth Amendment to the United States Constitution.

Statement of the Case.

During the periods here involved, respondents Haber, Tamillo and Winning were employed by Petitioner, publisher of the Encyclopedia Americana and related works, in the credit and collection department of its Beverly Hills office.* The primary tasks performed by these respondents were as follows: *First,* they attempted to collect delinquent accounts by telephone. This required delivery of a set, routine, predetermined speech asking customers for payment [see, *e.g.,* Rep. Tr. 382-383]. After the demand was made the account card would be placed back into a bin to be picked up by another collector the next month [Rep. Tr. 185-187; 230-231]. *Second,* they verified orders and checked credit. This task, performed by telephone men and office girls as well [*e.g.,* Rep. Tr. 53, 1056], required filling in the blanks on the back of sales contracts [Rep. Tr. 231, 323]. It required calling the customer to be sure he

*These Respondents were given by Petitioner the informal job title or designation "area supervisors" this is of course of no significance in determining the applicability of the exemption, 29 C.F.R. §541.99(c); 29 C.F.R. §541.201(b); *George Lawley & Son Corp. v. South,* 140 F. 2d 439 (1 Cir.), cert. den. 302 U.S. 746.

wanted to books, and then calling the customer's credit references to ask what their experience with him had been [Rep. Tr. 232, 233]. Any derogatory information was forwarded to the collection manager for final disposition [Rep. Tr. 175, 233, 393, 412, 588], and he often rejected their recommendations [Rep. Tr. 52, 412, 414, 588]. *Third,* they helped in the function of entering payments in the activity or collection book. This consisted of sorting thousands of coupons which had come in with payments to the cashier's office, sifting out those that were for delinquent accounts, and then making a notation of payment [Rep. Tr. 56, 162]. *Fourth,* to a limited extent, they were involved in correspondence work. This involved principally designating which of a number of available form letters should go out in connection with collections—the decision being governed by written instructions [Rep. Tr. 239-240]. They also handled complaint letters (as did the "correspondence girls") [Rep. Tr. 585, 1042]; but all serious complaint letters, such as those involving the Better Business Bureau or the Federal Trade Commission, were referred directly to the collection manager [Rep. Tr. 238, 272, 586, but see, 1031, 1049]. The collection manager had an assistant who was on a level above the area supervisors and who merely "accumulated problems" and referred all important ones concerning credit or cancellation of contracts to his boss [Rep. Tr. 421, 431]. The credit and collection department had no direct relation to policy making, and, except in its narrow field, nothing to do with execution of company policy [Rep. Tr. 778, see also 770-4].

The District Court held that these Respondents were administratively exempt under Section 13(a)(1) of the Fair Labor Standards Act as defined and delineated in 29 C.F.R. Section 541.2 [Clk. Tr. 230].

The Court of Appeals reversed, holding that they were not employed in an "administrative capacity", and remanded with instructions to determine the amount of overtime worked by Respondents and the compensation due them. The Court of Appeals specifically held that "the function of collecting accounts" was nonadministrative (Pet. App. 4, 5, 12; 268 F. 2d 856, 857, 858].*

*Petitioner apparently does not seek review of the decisions of the Court of Appeals respecting the named Respondents other than Messrs, Haber, Tamillo and Winning, the so-called "area supervisors" (Pet. 7).

ARGUMENT.

I.

The Decision of the Court of Appeals Is Consonant With Applicable Decisions of This Court and With Accepted Judicial Proceedings.

This Court has held that the Fair Labor Standards Act is a remedial act [*United States v. Darby,* 312 U.S. 100] and that it must be liberally construed so as to effectuate its purposes [*Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207; *Mitchell v. Vollmer and Company,* 349 U.S. 427]. Consequently, the over-riding policy is narrowly to construe against an employer the application of the exemptions [*Arnold v. Kanowsky,* 361 U.S. 388].

Before an employee can be denied the benefit of the Act, his employer has the burden of proving that each and every applicable condition set forth in the exempting regulation is fulfilled [*Walling v. General Industires Co.,* 330 U.S. 545.]

The court below noted that one of the criteria that must be met under the administrative exemption of 29 U.S.C. Section 213(a)(1) is that no more than 20 per cent of the employees' time be spent in non-administrative work [29 C.F.R. §541.2(d)]. It stated:

> "There is no evidence brought to our attention of compliance with this requirement. Indeed, the only evidence is to the contrary. Appellant Haber testified that about sixty per cent of his time was spent in the nonadministrative function of collecting accounts. (R.T. p. 51.) Ronald Tamillo estimated about eighty per cent of his time was spent on telephone collections or dealing with mer-

chandise. (R.T. p. 589.) Winning estimated that fifty per cent of his time was spent as a telephone collector. (R.T. p. 159.)

"In sum, the only evidence as to compliance with 29 C.F.R. § 541.2(d) is that there was no compliance. The court's conclusion that Haber, Ronald Tamillo and Winning were employed in an 'administrative capacity' is erroneous and must be reversed." (Pet. App. 5; 378 F. 2d at 857).

The testimony cited by the Court of Appeals relating to the percentages of time spent in performing non-administrative functions is the only such testimony in the record. Even if there were some evidence to support the conclusion of the District Judge, it was properly held "clearly erroneous" where the reviewing court on the entire evidence was left with the definite and firm conviction that a mistake had been committed. [*United States v. United States Gypsum Co.*, 333 U.S. 364].

II.

The Decision of the Court of Appeals Presents No Important Questions of Federal Law.

Petitioner contends that since the Court of Appeals concluded that the function of collecting accounts was non-administrative, it overlooked the provision in 29 C.F.R. Section 541.2(d) that activities which are "directly and closely related" to the performance of the work described in paragraphs (a) through (c) of Section 541.2 also qualify as exempt. Petitioner attempts to support this by stating that the Respondents' work involved executive functions and that the District Court had a "clear feeling" that, for these Respondents, col-

lecting was administrative work. While the statement of the Court of Appeals that no more than 20 per cent of the employees' time can be spent in nonadministrative work to qualify under Section 541.2(d) is not in the exact language of the regulation, there can be no presumption that the Court overlooked any of the requirements therein, and, furthermore, the record itself could not support the proposition that these Respondents' collecting activities were directly and closely related to administrative functions. The District Court concluded that the administrative, not a combination exemption applied [Clk. Tr. 230].

Respondents do not contest the proposition that an employee may be exempt if he performs a combination of administrative and executive work, but the record does not admit of such a finding. The work performed by Respondents did not consist of the "management of the enterprise" in which they were employed or of a "customarily recognized department or subdivision thereof" [29 C.F.R. § 541.1(a)]. Furthermore, in view of the minimal discretion and authority exercised by the assistant collection manager [Rep. Tr. 431] it would be illogical to conclude that these Respondents, who operated on a level beneath the assistant collection manager, had executive functions.

Petitioner also asserts that since 29 C.F.R. Section 541.2 applies to this case as it existed during the periods of employment in question, it necessarily follows that Respondents' work should be judged under the proviso to that section which required, during the time periods in question, only a salary or fee basis of pay at the rate of not less than $125.00 per week, rather than $150.00. Neither the District Court nor the Court

of Appeals applied the shorter test of the proviso. There is no indication that either court applied Section 541.2 except as it appeared during the periods of employment in question.

Even if it be assumed for purposes of argument that the proviso to 29 C.F.R. Section 541.2 did apply, no different result could possibly be forthcoming. The Court of Appeals has concluded that the collection activities of Respondents were nonadministrative. It has cited the only evidence in the record relating to the percentages of time the Respondents spent in performing this function. The proviso to 29 C.F.R. Section 541.2 requires essentially what is outlined in paragraphs (a) and (b); namely, that the employee's "primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his employer . . .," which includes work requiring "the exercise of discretion and independent judgment . . ."

While time alone is not the sole determinant of primary duty, "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 per cent, of the employees' time." [29 C.F.R. § 541.103].

The facts found by the Court of Appeals concerning nonadministrative collection duties as being primary, sufficiently appear in its opinion to support the judgment it has entered. [*Levenson v. Spector Motor Service,* 389 Ill. 466, 59 N.E. 2d. 817, aff'd. 330 U.S. 649.]

Throughout its Petition, Petitioner argues that the Court of Appeals reversed the District Court on the "sole ground" that 29 C.F.R. Section 541.2(d) was

not complied with. A fair reading of the decision, however, shows that a factual determination was made by the Court of Appeals that collecting accounts was "nonadministrative". Hence, there can be no doubt that even if the Court of Appeals relied upon the wrong section in the regulations, the reasoning underlying its decision was that nonadministrative functions comprised the primary duties of Respondents. A decision reaching a correct result should be sustained even though based on an erroneous reason [*Montana-Dakota Utilities Co. v. Northwestern Public Service Company*, 341 U.S. 246].

Conclusion.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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